

## Austria

# Supreme Court Asks Constitutional Court to turn down Insemination-Ban for Lesbian Couples

Rechtskomitee LAMBDA (RKL): “delighting and groundbreaking”

With introduction of registered partnership by 1st January 2010 Austria explicitly banned medically assisted procreation for lesbian couples. The Austrian Supreme Court now asks the Constitutional Court to turn down that ban as unconstitutional. Rechtskomitee LAMBDA (RKL), Austria’s civil rights organisation for homo- and bisexual as well as transgender women and men, is delighted.

Christina Bauer, an Austrian citizen, and Daniela Bauer, a German citizen, in 2008 entered into registered partnership in Germany and then moved to the city of Wels in Upper Austria. Christina wants to receive a child through medically assisted procreation (insemination) and Daniela agrees. Both are very much looking forward to live a happy family-life with Christina’s child.

But with introduction of registered partnership by 1st January 2010 Austria’s federal legislator explicitly banned medically assisted procreation for lesbian couples. Punishment: up to EUR 36.000,- or up to 2 weeks in jail. This ban prohibits lesbian women medically assisted insemination just on the basis that they are living with a woman instead of a man. Thus they are legally barred from any procreation as it cannot reasonably be expected from a lesbian woman to engage in sexual intercourse with a man, contrary to her sexual orientation and (for couples) contrary to their promise of faithfulness.

Daniela and Christina Bauer in 2010 asked the District Court of Wels to register Daniela’s consent to the insemination (this being, under Austrian law, one of the preconditions for lawful medically assisted insemination). The District Court refused in March 2010 and the Regional Court of Wels, on appeal, confirmed in June 2010. The appeals court saw neither a violation of the European Convention of Human Rights nor a violation of freedom of movement within the European Union (there is no such ban in Germany).

The Supreme Court disagrees. With its decision delivered today it applies to the Constitutional Court to delete, as unconstitutional, from the Act on Medically Assisted Procreation (Art. 2 par. 1) the words “of persons of opposite sex” (OGH 22.03.2011, 3 Ob 147/10d).

### **Adoption allowed, insemination banned**

The law, the Supreme Court says, „prohibits women living in a partnership with woman medically assisted procreation and excludes them from receiving and raising children“. The Supreme Court refers to the European Court of Human Rights (ECtHR), which stressed that the right “to conceive a child and to make use of medically assisted procreation for that end” is protected by the European Convention of Human Rights (Art. 8) and that the wish for a child constitutes a particularly important facet of an individual’s existence or identity (*S.H. v. Austria* 2010).

In addition the ECtHR ruled last year that also same-sex couples are “family” and do enjoy the protection of the fundamental right to family-life (Art. 8 ECHR) (*Schalk & Kopf v. Austria* 2010; *P.B. & J.S. v. Austria* 2010). Children become part of a family, the Supreme Court says, either by birth or by contract (adoption). Adoption by one part of a homosexual couple is not only legal in Austria but even a fundamental human right all over Europe (*E.B. v. France* 2008). Thus it would not seem reasonable to prohibit women living in a lesbian relationship the birth of a child through medically assisted procreation.

The law, the Supreme Court says, seems to be unconstitutional "insofar as it excludes medically assisted procreation for a woman living in a same-sex partnership and thereby, on the basis of her sexual orientation, denies her the possibility of fulfilling her desire to have a baby."

### **Two cases before the Constitutional Court**

The Constitutional Court now has to decide on two applications as last year Daniela and Christina Bauer themselves had applied to the Constitutional Court for the repeal of the statutory ban.

In this case of the two women the Austrian federal government heavily defended the ban in a written submission to the Constitutional Court adopted by unanimous decision of all federal ministers and signed by the Federal Chancellor's own hand.

„The Supreme Court's decision is delighting and groundbreaking", says *Dr. Helmut Graupner*, president of RKL and counsel of the two women, „We are confident that the Constitutional Court will take human rights as serious as the Supreme Court".

*Rechtskomitee LAMBDA (RKL), founded in 1991, on a supra-partisan and denominational level is working for the implementation of human rights for homo- and bisexual men and women. In its honorary board it convenes so prominent members as former Prime Minister Dr. Alfred Gusenbauer, President of Federal Parliament Mag. Barbara Prammer, former Minister of Justice Mag. Karin Gastingger, the Honorary President of the Parliamentary Assembly of the Council of Europe Peter Schieder, Federal Ombudsman Mag. Terezija Stoisits, former member of Vienna state parliament Marco Schreuder, former Director of Public Security Dr. Erik Buxbaum, the former President of National Judges Association Dr. Barbara Helige, the Chairwoman of the National Judges Association's Working Party on Fundamental Rights Dr. Mia Wittmann-Tiwald, the Vice-President of the Vienna Bar-Association Dr. Elisabeth Rech, the former President of D.A.S.-legal expenses insurance company Dr. Franz Kronsteiner, the President of Weisser Ring Dr. Udo Jesionek, the Secretary General of Amnesty International Austria Mag. Heinz Patzelt, the Vice-Chairperson of the Executive Board of the European Union Agency for Fundamental Rights Univ.-Prof. Dr. Hannes Tretter, and the well-known human-rights experts Dr. Lilian Hofmeister and Univ.-Prof. Dr. Manfred Nowak, the constitutional law professors Univ.-Prof. Dr. Christian Brünner, Univ.-Prof. Dr. Bernd-Christian Funk, Univ.-Prof. Dr. Heinz Mayer and Univ.-Prof. Dr. Ewald Wiederin, famous child- and adolescent psychiatrist Univ.-Prof. Dr. Max Friedrich and the Vienna Child- and Youth-Ombudspersons DSA Monika Pinterits and Dr. Anton Schmid, sexologists Univ.-Prof. Dr. Josef Christian Aigner, Univ.-Prof. Dr. Rotraud Perner and Univ.-Lekt. Mag. Johannes Wahala, Life-Ball-Organisor Gery Keszler and many more. October 2nd, 2006, RKL's 15 years anniversary has been celebrated in historic Ceremonial Act "Against Sexual Apartheid" in the lower chamber of Austrian federal parliament. This first honouring of an lgbt organisation in the plenary session hall of a national parliament worldwide took place in attendance of over 500 guests including highest representatives from the judiciary, administration and politics (<http://www.rklambda.at/festakt/index.htm>). Since 2010 RKL is a member of the Fundamental Rights Platform of the European Union Agency for Fundamental Rights ([www.fra.europa.eu](http://www.fra.europa.eu)).*

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